IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3388

United States of America,

Appellee,

vs.

Michael Alan Mooney,

Appellant.

On Appeal from the United States
District Court for the
District of Minnesota

BRIEF AND ADDENDUM OF APPELLANT MICHAEL ALAN MOONEY

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is a case involving allegations of an insider trading scheme. Appellant Michael A. Mooney contends that the District Court erred in several respects, including failure to recognize insufficiency of evidence regarding essential aspects of the charges. Further, Mr. Mooney contends that the District Court erred by ruling that the prosecutor could impeach him with a fifteen year old gross misdemeanor conviction, thereby violating Mr. Mooney's Fifth and Sixth Amendment right to testify in his defense. Finally, Mr. Mooney raises two issues of first impression concerning the legal construction of the term "gain resulting from the offense" under the United States Sentencing Guidelines. If Mr. Mooney prevails, his sentence will be substantially reduced.

As noted above, the issues on this appeal are both complex and novel. Accordingly, Mr. Mooney requests thirty minutes to present his argument in this matter.

JURISDICTIONAL STATEMENT

The indictment filed by the Government in this criminal matter alleged violations of federal statutes. Accordingly, the District Court had subject-matter jurisdiction pursuant to 18 U.S.C. § 3231.

This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The District Court sentenced Mr. Mooney on August 21, 2002 and filed its Judgment on September 12, 2002. Mr. Mooney filed his Notice of Appeal on August 30, 2002, which is within the time limit required by Fed. R. App. P. 4(b)(1)(A).

This appeal is taken from a final judgment that disposed of the matter in its entirety and from the sentence imposed upon Mr. Mooney.

STATEMENT OF ISSUES ON APPEAL

I. Did the District Court err in construing the term "gain resulting from the offense" under the United States Sentencing Guidelines; does "gain" include gain that occurred after the offense ended; must "gain" be reduced by losses realized by the defendant as a result of the offense?

U.S.S.G. § 2B1.4
15 U.S.C. § 78u-1(f)
SEC v. MacDonald, 699 F.2d 47 (1st Cir. 1983)

II. Did the District Court err in declining to grant Mr. Mooney's Motion for a Judgment of Acquittal based upon insufficiency of the evidence; did the Government fail to prove elements of the alleged crimes?

United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976)
Schmuck v. United States, 489 U.S. 705, 109 S. Ct. 1443 (1989)
United States v. Loe, 248 F.3d 449 (5th Cir. 2001)

III. Did the District Court err in ruling that the prosecution could impeach Mr. Mooney with a 15 year old gross misdemeanor conviction depriving him of his Fifth and Sixth Amendment right to testify in his own defense?

United States v. Dennis, 625 F.2d 782 (8th Cir. 1980)

STATEMENT OF THE CASE

On April 26, 2001, the United States filed a 17-count Second Superseding Indictment (indictment) in the District of Minnesota. The indictment charged that appellant Michael Alan Mooney violated the following federal laws: (1) Counts 1-8, mail fraud in violation of 18 U.S.C. §§ 1341, 1346; (2) Counts 9-12, securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a), 17 C.F.R. § 240.10b-5; and Counts 13-17, money laundering in violation of 18 U.S.C. § 1957. The Indictment also alleged that Mr. Mooney should forfeit $428,000 pursuant to 18 U.S.C. § 982.

The matter was tried before a jury in United States District Court, District of Minnesota, the Honorable James M. Rosenbaum, Chief Judge, presiding. The trial began on October 9, 2001. On October 30, 2001, the jury found Mr. Mooney guilty of all 17 counts alleged in the Indictment. The jury also found that Mr. Mooney must forfeit $70,000.

On August 21, 2002, the District Court sentenced Mr. Mooney to serve 42 months in the custody of the United States Bureau of Prisons, to pay a special assessment in the amount of $850, and to pay a fine of $150,000.

Mr. Mooney filed a Notice of Appeal on August 30, 2002, initiating the appeal to this Court.

STATEMENT OF FACTS

I. Mr. Mooney's employment at United Healthcare.

Michael Mooney was an employee at a company called United Healthcare Corporation (United), which provides health insurance products to customers (typically employers) located throughout the United States. (T. I-52 to -55.).[1] United is a corporation based in Minnetonka, Minnesota, and its stock is publicly traded on the New York Stock Exchange. (T. I-48.)

In 1985, Mr. Mooney began working at United as an underwriter. An underwriter's task is to determine the appropriate price for insurance products such that claims will not outstrip revenue from premiums. (T. I-55.)

As United grew, Mr. Mooney received promotions and rose to the position of vice president of underwriting. In that capacity, Mr. Mooney supervised employees in United's underwriting department. (T. III-6, 64, 93.)

II. Mr. Mooney's margin account.

In 1990, Mr. Mooney opened a margin account at a discount brokerage house called Recom Securities (Recom) in Minneapolis. (T. III-171 to –74.) Mr. Mooney's account was a concentrated account, meaning that he only invested in one company—United. (T. IV-28.) The Recom account was a "margin account,"

[1] The notation (T. _) refers to the trial transcript. The Roman numeral refers to the trial transcript volume, and the standard numeral refers to the page number.

meaning that Mr. Mooney could borrow funds from Recom against the holdings in the account. (T. III-175.)

Because Mr. Mooney had a concentrated account, the margin rule was that he must hold sufficient securities in his account at all times, such that the amount of funds he had borrowed from Recom was, at most, 50% of the value of securities in the account. (T. III-174 to –77, IV-28.) For instance, Mr. Mooney could borrow $500,000 from Recom, so long as he had $1,000,000 equity in the account. (T. III-176 to –78.)

If the value of the securities in Mr. Mooney's Recom account were to drop for any reason (e.g., the price of United stock drops), then Recom would make a "margin call" to Mr. Mooney. (T. III-174 to –77, IV-28.) A margin call is a request by Recom to a customer such as Mr. Mooney to restore equity into the margin account so that the amount borrowed would equal no greater than 50% of the equity in the account. (T. III-177.)

A margin call was undesirable because, if Mr. Mooney failed to add sufficient equity to the account, Recom could sell all of his securities at an unfavorable price until the debt fell to 50% of the value of the securities in the account. (T. IV-30 to –31.)

III. United's 1990's acquisitions and the United-Metra merger.

United began as a small company in the 1980's. In the 1990's, however, United implemented a business strategy of acquiring small health insurance companies. (T. I-56 to –59.) During the early 1990's, United acquired several "zip code" companies located in different geographical regions in the United States. (T. I-60 to –64 & Gov't Ex. 81.) The acquisition of these "zip code" interests enabled United to do business in several discrete regions located nationwide. (*Id.*) During this time, United's business focused on managed care insurance products, principally operating health management organizations (HMO's). (T. I-52–55.)

MetraHealth (Metra) was a health insurance company. Unlike United, it was in the indemnity business. It had no network of doctors and hospitals to provide its insureds with discounted rates. Metra simply paid the usual and customary rate to doctors and hospitals for the care of its insureds. Metra provided health insurance to more individuals than United, but had approximately the same amount of revenue. (T. I-56 to 58, II-2 to 6, Gov't. Exs. 82, 83.)

In 1995, Metra was a newly-formed company—a troubled combination of two major health insurance companies, Met Life and Traveler's Insurance. (T. II-4 to 5, 100.) All witnesses, including the Government's witnesses, conceded that

Metra was a troubled company with significant problems. (T. II-51 to 57, 100, 117, 123 to 28, III-40 to 43, 106, Gov't Exs. 27, 35.) Metra was a privately-owned company, and its stock was not traded on the public markets. (T. II-4.)

In 1995, United entered into business negotiations with Metra. (T. II-93.) These negotiations involved a potential joint venture or merger between United and Metra. (T. II-93, III-22.)

This proposed transaction involved large potential rewards, but also significant business risks. (T. II-51.) The potential rewards were: (1) that United would become a large nationwide company; (2) that United would acquire millions of additional members; and (3) that United would acquire expertise in new areas and product lines it had not focused on before. (T. III-23.)

All witnesses conceded that the potential acquisition would also carry significant business risks, including: (1) the full impact of the deal on the health care industry would not be known for a number of years; (2) no one knew whether United and Metra would be able to work together successfully; (3) some of Metra's businesses had cost control problems; (4) businesses like Metra historically had experienced unfavorable earnings surprises on different occasions; (5) there might be a media backlash against the health care industry in general; (6) there was no guarantee the management team of the merged companies would be able to successfully handle the large increase in employees, different businesses, and different markets; and (7) Metra's existing HMO businesses were not the largest or even second-largest HMO firms in their respective regions. (T. II-51 to –54, -122 to -30, III-57, -106.) At the time of the merger negotiations, one analyst described Metra's regional position as "the number five filly in a three-horse race," meaning that Metra's position was not good. (T. II-54 & Gov't Ex. 35.) United's Chief Information Officer was surprised by the acquisition of Metra because he saw it as a return to the business model that had nearly bankrupted United in the 1980s. (T. VI-60 to 61.)

IV. United-Metra due diligence meetings.

During the 1995 negotiations, United and Metra engaged in a series of "due diligence" inquiries. In the context of mergers and acquisitions, the term "due diligence" means exchanging information—typically via confidential meetings at each company's headquarters—to determine how each company is performing and, more subjectively, whether the merger/acquisition makes good business sense. (T. II-101, -107 to –08.) Typically, the acquiring company and the target company involved in due diligence inquiries agree to keep such meetings secret in order to avoid potential effects on the stock of the companies, as well as internal company problems (e.g., possibility of employee discord based upon fears of layoffs). (T. III-9 to –10.)

Mr. Mooney had attended due diligence meetings on behalf of United throughout the 1990s, the period of time when United had aggressively sought out acquisitions. James Conto, United's Vice President of Mergers and Acquisitions, testified that from 1990 to 1995, United was "very active in acquisitions" and "looked at even more than [United] actually did." (T. III-6.) Mr. Mooney typically was a member of the due diligence teams. (*Id.*) Indeed, in 1994 alone, Mr. Mooney participated in due diligence trips involving ten different prospective deals. (T. III-43 to –44, Def. Ex. 107.) Only two of these deals closed. (*Id.*) The performance of due diligence did not mean that a deal would be done and, in fact, deals often failed to close after due diligence. (T. II-119 to -22, V-59.) United employees were doing due diligence almost all the time. (T. V-56 to 59; Def. Exs. 108 and 132.)

Beginning on May 11, 1995, representatives of United attended due diligence meetings at Metra's corporate headquarters in Virginia. (T. III-25 to –26 & Gov't Exs. 11, 12.) Mr. Mooney attended these meetings, just as he always had during the 1990s. (*Id.*)

Conto testified that, even though Mr. Mooney attended the May 1995 United-Metra due diligence trip to Virginia, there is no way that Mr. Mooney would know whether the proposed deal would close. (T. III-45 to –46.) The details of the proposed purchase price and similar critical information were in the hands of upper management only, and Mr. Mooney did not have access to such information. (*Id.*) Nor did Mr. Mooney have access to detailed financial reports completed by United's investment banker. (T. III-45 to –48.)

V. United's insider trading policy.

United had a written policy concerning insider trading. (Gov't Exs. 1-5.) The policy prohibited United employees from trading United stock in two situations. First, employees were told not to trade during a "blackout period" from the end of any quarter until United released its earnings report. (T. III-67.) Second, United employees were told not to trade in United stock when they possessed material information (i.e., information that a reasonable investor would use to decide whether to invest). (T. III-141 to –43.) Bridgid Spicola, United's corporate counsel and a Government witness, testified that a "handful" of United employees made transactions in United stock during a blackout period in 1995, a violation of the insider trading policy. (T. III-166.)

Conto testified that, at the United-Metra due diligence meetings, United's corporate counsel told the attendees not to trade in stock during the due diligence period. (T. III-39 to –40.) However, no Government witness testified as to circumstances suggesting that Mr. Mooney heard and/or understood such a warning. And, in fact, the corporate counsel who allegedly gave the warning did not testify at all.

Daniel Freier, a consultant who attended the United-Metra due diligence meetings in Virginia, testified that he had no recollection of receiving such a warning. (T. VI-33.) Jennifer McGill, an employee of United's underwriting department who went on several due diligence trips, testified that no one on those trips warned the group not to trade during the due diligence period. (T. VI-42 to –43.) And James Bradley, United's former Chief Information Officer, testified that United "was fairly sloppy in terms of how it informed nonofficer employees as to whether or not they could trade." (T. VI-62.) Bradley recalled that during several due diligence trips, United did not provide warnings to its employees not to trade United stock. (*Id.*)

VI. News of the potential United-Metra merger becomes public.

On June 21, 1995, a news article appeared in the *New York Times*. The article reported speculation that United was in advanced merger discussions with

Metra. (T. II-17 to –20, Gov't Ex. 97.) The article stated ". . . Metra . . . is looking for a buyer, insurance executives and industry analysts said yesterday. Negotiations for a merger with United . . . are far advanced, although no agreement has been completed, according to officials at United . . . and analysts who spoke on condition of anonymity." Gov't Ex. 97. The news was in the market on June 20. On June 21, 1995, United issued a press release confirming its business discussions with Metra; the release stated that "the parties have no agreement on the terms of any such transaction and there can be no assurance that any such agreement will be reached." (T. II-26 to –27, Gov't Ex. 108.) On June 22, 1995, a news article in the *Wall Street Journal* also reported speculation of a United-Metra merger, including possible terms of the deal. (T. II-23 to –26, Gov't Ex. 89.) On June 26, 1995, United issued a press release that United had reached an agreement with Metra whereby United would acquire Metra for a purchase price of $1.65 billion in cash and stock. (T. II-27 to –28, Gov't Ex. 109.)

The chronology of the United stock price around the announcement of the United-Metra merger was as follows:

Date	**Closing price of United stock**
June 19, 1995	$40.750
June 20, 1995	$40.125 (date of first news in market)
June 21, 1995	$42.125 (date of announcement of talks)
June 22, 1995	$44.625
June 23, 1995	$43.000

June 26, 1995	$43.000 (date completion of deal announced)
June 27, 1995	$41.000
June 28, 1995	$40.625

(Gov't Ex. 76, 97, 108; Def. Ex. 34.)

VII. Mr. Mooney's trades in call options during the United-Metra merger.

On different occasions in May 1995 and June 1995, Mr. Mooney purchased call options in United stock.[2] A call option is a security which might be described as a "leverage tool," meaning that it can limit the holder's risk. (T. IV-14.) When a person purchases a call option for a particular stock, such as United, the buyer is purchasing the right to purchase that stock at a certain price and by a certain time. (*Id.*) One call option permits the buyer to purchase 100 shares of stock at that particular price and time. (*Id.*) For instance, if a buyer were to purchase 100 December 35 call options in June 1995, said call options would give the buyer the right to purchase 10,000 shares of United stock at $35 per share in December 1995 or earlier. (*Id.*)

Mr. Mooney purchased certain call options during this time period, and in fact he made the trades in his own name and in such a way that his trades easily could be traced to him. From May 24-26, 1995, Mr. Mooney purchased 200 January 35 call options in United stock. (T. V-5 to –11, Gov't Ex. 64.) On June 6,

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[2] Call options are to be distinguished from United's employee stock options described *supra* Facts § II.

1995, He purchased 100 September 35 call options. (*Id.*) And on June 14, 1995, he purchased 100 December 35 call options. (*Id.*)[3]

Mr. Mooney sold his call options on different days long after the news of the Metra acquisition appeared in the *New York Times* and the *Wall Street Journal*, and long after the company announced that a deal had been closed. Mr. Mooney sold one quarter of his options, his September 35 calls, on July 14, 1995, nearly <u>three weeks</u> after news of the acquisition became public. (*Id.*) He sold his December 35 call options and January 35 call options, comprising the other three quarters, on October 4 and 5, 1995, respectively. (*Id.*) These sales occurred over <u>three months</u> after news of the Metra acquisition became public. (T. V-33.)

The FBI agent who investigated Mr. Mooney's trades testified that Mr. Mooney purchased all of these call options in his own name. (T. V-32.) The agent testified that Mr. Mooney reported all the transactions on his income tax returns. (T. V-36.)

United's corporate counsel, David Lubben, testified that in 1998 he conducted an internal inquiry in response to information requests from government agencies. (T. IV-59 to -62.) According to Lubben, during a brief meeting in Mooney's office, Lubben asked Mr. Mooney, "Did you trade in United Health

[3] Please refer to Gov't Ex. 64 and Def. Ex. 100 in the Addendum which show Mr. Mooney's purchases and sales of call options.

Group securities around the Metra Health transaction?" (T. IV-63 to -64.) Lubben testified that Mooney responded "no." (*Id.*) However, Lubben conceded that the conversation had taken place two and one-half years prior, and that he had not taken any notes as to the interview. (T. IV-74 to -76.)

VIII. Mr. Mooney's margin call problem.

Merle Levitt—the president of Recom Securities and a witness for the Government—testified that the value of equities in Mr. Mooney's Recom account had dropped such that, by March 31, 1995, Mr. Mooney was very close to a margin call situation. (T. IV-35.) The reason for the margin problem was that the value of United stock had dropped. (T. IV-36.) In April 1995, Mr. Mooney exercised 20,000 employee stock options, infusing equity into the Recom account. (T. III-161 to –62, IV-35.) Mr. Mooney later sold these 20,000 shares of United at a loss of $142,325. (T. I-35, IV-35 to –38, Gov't Ex. 41 and 73; Def. Ex. 52.) Levitt agreed that the infusion of United stock "cured" the margin problem in Mr. Mooney's account. (T. IV-36 to –37.)

Mr. Mooney's theory of the defense was and is that the main reason for his purchases of United call options in May and June 1995 was the need to cure his margin account problem, not because he was attempting to make profits by using information he had obtained about the possible (but by no means certain) United-Metra merger. (T. I-32 to -40.)

Mr. Mooney's theory was supported by the evidence. As noted above, all Government witnesses who were asked about the matter conceded that Metra was a troubled company and that the potential deal carried significant business risks. (T. II-51 to –54, -122 to -30, III-57, -106.) Conto testified that the purchase price had not been finalized until June 25, 1995, and that Mr. Mooney could not have known about the final price and did not attend the Board of Directors meetings where the decision to complete the acquisition were made. (T. III-47 to –49.)

Even if Mr. Mooney could predict that the merger would close, Mr. Mooney could not have known whether such a merger would bolster United's earnings per share; there is no way for anyone to make such prediction with any degree of certainty. (T. II-56 to -60.) In fact, Conto and other United executives believed that the deal would result in less earnings per share in the short term, and would not increase earnings per share for at least two years. (T. III-57 to -58, -109 to -10, -121.) And, in all cases when the question was posed to a Government witness, the witness responded that there is no way that Mr. Mooney or anyone else could have definitively predicted the effect that the merger would have on United's stock price. (T. III-58, -81 to -82.)

Five government witnesses testified about earnings and share price.

The first was John Penshorn, a securities analyst employed by United. (T. I-47 to 48.) He testified that at the time of the merger there was a "significant level of debate" on Wall Street as to what the deal was going to do to United's earnings per share. (T. II-56.) He admitted that it was very difficult to predict earnings per share. He testified that the predictions he himself made as to what the earnings for 1996 would be were a "substantial disappointment . . . It was painful for me. I was wrong. Very publicly." (T. II-56 to 59.) Penshorn admitted that in 1995 another respected analyst, upon learning of the deal, did not change her 1995 earnings estimates. He said that the transaction was not expected to close until the fourth quarter of 1995 and no one could know exactly what the earnings would be. (T. II-75 to 76; Gov't Ex. 33.) Yet another analyst stated after the acquisition that his rating was "neutral" meaning "don't own this stock." (T. II-79; Gov't Ex. 34.)

The second government witness was Cody Smith, an investment banker from Goldman Sachs. (T. II-88.) Smith put together the deal, and had put together previous deals for the company. (T. II-92 to 93.) Cody Smith did not testify that the 1995 earnings would necessarily increase. Smith prepared analyses which showed that under a number of different assumptions the deal would be dilutive to 1995 earnings, not accretive. (T. II-103 to 106; Gov't Ex. 25, p. 4737.) He testified that by May, the due diligence showed he had "a little less confidence in the earnings for next year than we had previously." (T. II-117; Gov't Ex. 27, p. 4790.) He found that Metra's business had deteriorated over the past several years. (T. II-127 to 130; Gov't Ex. 25, p. 4675 and 4677.) Metra's earnings projections were a year old and the current executives were not convinced Metra would earn $200 million in 1995. (T. __;[4] Def. Ex. 83, p. 1.) There were grave concerns about the quality of Metra's earnings. By June 21, the date talks were announced, the estimated 1995 earnings had fallen to less than $200 million, the number of insured lives had dropped, and there were problems with financial controls. (T. __;[4] Def. Ex. 88.) There was no evidence Mr. Mooney saw any of Smith's work, or knew its contents.

The third government witness to testify on this subject was James Conto, the Vice President for mergers and acquisitions. (T. III-5). Conto ran the due diligence effort. (T. III-19.) Conto told the jury that based upon the economic models which he prepared, his judgment was that in the first two years after the deal the acquisition of Metra would have a <u>negative</u>, not accretive, impact on United's earnings per share. He thought that in the long run, longer than two years, the earnings per share would be accretive. (T. III-57.) It proved that Conto

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[4] The transcript of half of the defense cross examination of Smith was never prepared by the court reporter despite being ordered by the defense.

was correct about most of these predictions. Conto also testified that Mr. Mooney could not have known if the stock price would go up or down as a result of the merger, because even Conto did not know. The company's own position was that there would not be any effect on earnings for a year after the deal. (T. III-58.) It is the perception of earnings growth that drives the stock price. (T. III-59.)

The fourth government witness to testify about these matters was Greg Springer, the Controller of United Heatlh Care, who participated in the due diligence effort. (T. III-61, 71.) Springer testified that he helped do financial analysis of the deal to figure out what price United should pay for Metra. Mr. Mooney was not involved in this financial analysis. Springer testified that before the Metra deal was announced he did not know what United's stock price would do when the deal was announced. (T. III-78 to 79.) Before the deal, he thought it would be accretive to earnings based upon the financial calculations he did that did not involve Mr. Mooney. But he admitted that he did not know if the stock would go up after the deal, and said it would be "just speculation." (T. III-81.)

The final witness to testify about earnings and stock price was David Koppe, the Chief Financial Officer. (T. III-92.) Koppe testified that when the deal was struck, the parties made "earn-out" agreements because of worries about whether the earnings would come through as predicted. (T. III-109 to 110.) Koppe wrote a press release announcing the June 26, 1995 consummation of the deal in which he advised the market that the transaction was expected to be accretive to earnings upon the closing of the deal. Koppe himself believed this at the time. However, he admitted that there were a lot of people involved with the due diligence who did not believe the deal would be accretive to earnings. In the end, Koppe was wrong and the deal was not accretive to earnings. (T. III-113, 120, 121; Def. Ex. 34.) Koppe admitted that he and the management team were uncertain about what market reaction to the deal would be. He admitted he really had no idea what the stock price would be right after the deal; he knew more about the finances of United than Mr. Mooney did. (T. III-106.)

The record contains no evidence as to what Mr. Mooney knew or thought about earnings and share price. It is certain he was unaware of the detailed earnings projections of Goldman Sachs. (T. III-46, 58.) As the underwriter on the deal he told Conto that Metra's projected rate increases probably would not cover its costs in its small group area. (T. III-47.) Mr. Mooney did not participate in the final financial analysis of the deal in June of 1995. (T. III-48.)

Mr. Mooney's defense was significantly bolstered by the testimony of Edward S. Adams. Adams is a professor at the University of Minnesota Law School. (T. V-46.) Professor Adams earned a J.D. from the University of Chicago

Law School, as well as an M.B.A from the University of Minnesota. (*Id.*) He has practiced law concerning mergers and acquisitions at a nationally-renowned law firm, has written scholarly articles concerning corporate finance, and is a principal of a 15,000-customer securities firm. (T. V-47 to –48.)

Professor Adams reviewed relevant research analyst reports, United documents, and Mr. Mooney's account documents. (T. V-50.) He concluded that the Metra acquisition had no lasting effect on the price of United stock in 1995; rather, under a mathematical model used in the industry, the price of the stock was driven by the market as a whole. (T. V-52 to –54.) Because of the above-stated problems with Metra, analysts were unsure as to what effect the Metra acquistion would have on United's performance. (T. V-55.)

Professor Adams noted that, in a merger situation, the scholarly literature predicts the price of stock of the acquiring company (United) <u>will fall</u> in the short term, whereas the price of stock of the target company (Metra) would be expected to rise in the short term. (T. V-56 to –57.) Based on the available information, Professor Adams opined that Mr. Mooney did not use material information to trade the call options. (T. V-82 to –83.) Professor Adams provided several reasons for this opinion: (1) Mooney traded the call options in his own name. (T. V-64); (2) One would typically expect the price of United stock to drop in the post-acquisition short-term (T. V-59); (3) Mooney purchased more expensive call options that were set to expire far into the future, whereas an inside trader would purchase less-expensive call options set to expire in the near future (T. V-59 to 60); (4) Mooney sold his call options between three weeks and three months after news of the acquisition became public, whereas an inside trader would typically sell call options right after news of the merger became public (T. V-62 to 63); (5) In past United acquisitions, the price of United stock actually tended to drop in the short term after the acquisition (T. V-70); and (6) If Mooney had been trading using material information, he could have made much more money doing it by exercising additional employee stock options (T. V-72.) Professor Adams testified as follows:

> Q: Considering all the factors that you have just related to us, if [Mooney] were trading on news of the merger, would he have done it the way he did?
>
> A: I don't believe so. * * * [I]n my view, if people do, that, would among other things, put, they buy stock in other people's names, they buy it in other accounts, they buy a lot more options than [Mooney] bought. They buy [options] for a lot shorter time period. * * * [T]hey would do it to really load up on the options, and then sell them immediately upon the announcement. And from what I could tell on this, there was no evidence that * * *, any of those things occurred. So it's very, it's totally unusual.

(T. V-63 to 64.)

Contrary to the theory that Mr. Mooney traded call options based upon news of the United-Metra merger, Professor Adams set forth an alternative explanation. He noted that Mr. Mooney retained significant holdings in United stock and did not convert the stock to call options, indicating that Mr. Mooney was looking at the long-term viability of the company and was not trying to make a "quick score" on a possible merger (which might or might not occur). (T. V-64.) Professor Adams noted that an analysis of Mr. Mooney's account showed that Mr. Mooney needed additional equity to avoid a margin call. Adams observed that, in such a case, it is common for an investor to sell off stock to cover the debt and, if the investor still feels that the stock is a good one, purchase call options (which typically cost less than the stock). (T. V-66.)

Further, Adams observed that there appeared to be a seasonal trend in the price of United stock, such that the price of the stock tended to fall in the spring and rise in a later part of the year. (T. V-65, Def. Exs. 116-19, 125.) If an investor observed this pattern, he or she might rationally make the trades that Mr. Mooney made on that basis alone. (T. V-67 to –69.)

Additional relevant facts are set forth below under the separate argument headings, along with citations to the record.

SUMMARY OF ARGUMENT

The District Court erred as a matter of law in construing the term "gain resulting from the offense" as it is used in the United States Sentencing Guidelines. The District Court construed the term to mean all of Mr. Mooney's gain from the transactions alleged in the Indictment. However, the proper construction of that term requires courts to determine that amount of gain which reasonably could have been derived from the allegedly improper transactions, subtracting the amount of gain due to ordinary market forces. Existing statutes and case law indicate that this should be accomplished by determining the price of Mr. Mooney's securities a reasonable time after the inside information alleged in the Indictment became public.

Mr. Mooney's mail fraud, securities fraud, and money laundering convictions must be reversed for insufficiency of the evidence. Even the Government witnesses conceded that there is no way Mr. Mooney or anyone else could have accurately predicted what would happen with the price of United stock after the merger. No evidence supported the charges levied in the Indictment, which specifically alleged that Mooney acquired information that the merger would increase earnings per share and would raise the price of United stock.

In addition, there was no proof that the mails were used in furtherance of the alleged scheme, an essential element of the mail fraud counts.

The Government did not prove that “dirty” money was transferred out of Mr. Mooney’s margin account, meaning that the Government did not produce sufficient evidence to prove the money laundering counts.

Finally, at trial, the district court erroneously held that Mr. Mooney could be impeached with a 15-year-old failure-to-file tax conviction were he to take the stand, which deprived Mr. Mooney of his Fifth and Sixth Amendment right to testify in his own defense.

Under these circumstances, Mr. Mooney’s convictions should be reversed. Alternatively, the case should be remanded to the District Court for a new trial or for resentencing.

ARGUMENT

I. The District Court erred as a matter of law in construing the term "gain resulting from the offense" under the United States Sentencing Guidelines and, because of this error of law, imposed an illegal sentence upon Mr. Mooney; "gain" does not include gain that accrued after the offense ended; "gain" must be reduced by losses realized by the defendant as a result of the offense.

In sentencing Mr. Mooney, the District Court explicitly adopted the calculations contained in the Presentence Report (PSR). (ST. 6.)[5] In so doing, the District Court held that Mr. Mooney's "gain resulting from the offense"—as that term is defined in United States Sentencing Guidelines—was Mooney's *total gain* from the sale of his call options, rather than the gain attributable to his alleged use of inside information.[6] The District Court erred as a matter of law in its construction of the sentencing guidelines. This statutory construction issue is one

[5] The notation (ST. _) refers to the sentencing transcript.

[6] This holding is implicit in the PSR's treatment of Mr. Mooney's "gain resulting from the offense." Using the guidelines in effect at the time of the offense, the District Court determined the gain by subtracting the purchase price from the sale price of the call options allegedly involved in the fraudulent scheme. (PSR ¶¶ 12, 15, 28.) The District Court held that this was proper even though Mooney sold these call options weeks and in some cases months after news of the merger became public. (PSR ¶¶12-15.)

of first impression for this Court: Under U.S.S.G. §§ 2B1.1, application note 2(B), and 2B1.4,[7] how should courts construe the term "gain resulting from the offense"?

Interpretation of the sentencing guidelines and application of the guidelines to the facts of the case is subject to a *de novo* standard of review. *United States v. Roggy*, 76 F.3d 189, 192 (8th Cir. 1996). Further, interpretation of the language of a particular provision of the Sentencing Guidelines is subject to this Court's *de novo* review. *See, e.g., United States v. Mann*, 315 F.3d 1054, 1055 (8th Cir. 2003).

In insider trading/mail fraud cases, such as this one, the guidelines direct district courts to determine the "gain resulting from the offense" or the "gain that resulted from the offense" in determining the defendant's sentence. U.S.S.G. §§ 2B1.1, application note 2(B), 2B1.4.

[7] These are references to the guidelines which were in effect at the time of sentencing. The District Court used the 1995 guidelines, which contained similar terms. U.S.S.G. §§ 2F1.1, note 8 ("gain from committing the fraud"); 2F1.2(b)(1) ("gain resulting from the offense"). The Court was required to use the guidelines manual most favorable to Mr. Mooney. *Compare* U.S.S.G. § 1B1.11(a) (general rule is to use guidelines manual in effect at time defendant is sentenced), *with* U.S.S.G. § 1B1.11(b)(1) (if application of current guidelines would violate *ex post facto* clause of U.S. Constitution, court must apply guidelines manual in effect at date offense committed), *and United States v. Reetz*, 18 F.3d 595 (8th Cir. 1994) (*ex post facto* clause violated where defendant sentenced and current guidelines would impose harsher sentence than guidelines in effect at time crime committed). Depending on the actual gain calculation, either set of guidelines might apply.

Unless the guidelines provide a special definition, courts attribute an ordinary meaning to a term. *Chapman v. United States*, 500 U.S. 453, 462, 111 S. Ct. 1919, 1925 (1991). The guidelines do not define the term "gain resulting from the offense," but rather explain as follows:

> Because the victims and their losses are difficult if not impossible to identify, <u>the gain, i.e. the total increase in value realized through trading in securities</u> by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

U.S.S.G. § 2B1.4, background (emphasis added).

The district court used this formula in error:

TOTAL SALE PRICE OF OPTIONS	$532,482.49
LESS TOTAL PURCHASE PRICE OF OPTIONS	(<u>$258,282.93</u>)
GAIN	$274,199.96

PSR, ¶¶12-15, 28.

Mr. Mooney contends that the trial court should not have counted the gain accrued to him after the inside information became available to the trading public, ending the offense and placing the trading public on the same footing as Mr. Mooney.

To understand why Mr. Mooney is right and why the government and the district court are wrong, we must turn to the calendar of events proven at trial; the following is what the evidence showed as to the share prices and volumes in the market as of certain dates:

Date	Price	Volume
June 19	$40.750	973,600
June 20	$40.125	535,900 (date first news in market)
June 21	$42.125	2,194,000 (date of announcement of talks)
June 22	$44.625	4,529,900
June 23	$43.000	1,652,500
June 26	$43.000	3,800,000 (date of announcement of deal)
June 27	$41.000	4,491,800
June 28	$40.625	3,246,800
June 29	$41.000	1,572,500
June 30	$41.375	1,778,400
July 3	$42.000	692,200

See Gov't Ex. 76, 97, 108; Def. Ex. 34.

Mr. Mooney contends that the sentencing guideline requires that the gain resulting from the offense not include any gain realized after June 28, 1995, when the deal was inked and confirmed to the public in a press release. See Def. Ex. 34. His analysis begins with the plain, ordinary meaning of "gain resulting from the offense," which obviously does not include gain resulting from other causes. All of the gain after June 28 occurred after the non-public information about the deal became public. By then, the offense had ended. There can be no "gain resulting from an offense" which has ended.

The language "total increase in value realized" in the background comment to § 2B1.4 can be read to mean all gain whatsoever, a meaning different than the guideline itself. When guideline commentary is inconsistent with the guideline, we must follow the guideline rather than the commentary. *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913 (1993). At worst from Mr. Mooney's point of view, this reading of the background comment would simply make the guideline ambiguous. And "[w]here there are two plausible readings of a guideline provision, [this Court] appl[ies] the rule of lenity and give[s] the defendant the benefit of the reading that results in the shorter sentence." *United States v. Oetken*, 241 F.3d 1057, 1060 (8th Cir. 2001); *accord United States v. Hutton*, 252 F.3d 1013, 1017 (8th Cir. 2001); *United States v. Pharis*, 176 F.3d 434, 436 (8th Cir. 1999).

There is a paucity of case law interpreting Section 2B1.4 (2001) or its predecessor, Section 2F1.2 (1994) in a criminal insider trading case.

It appears that no criminal insider trading cases specifically address the meaning of the term "gain resulting from the offense." However, inferences from existing civil case law inform the matter. Civil law may be applied when analyzing criminal matters concerning federal securities law. *United States v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976); *see also Chiarella v. United States*, 445 U.S. 222, 100 S. Ct. 1108 (1980) (using principles of civil enforcement law in a criminal securities case).

It is a fundamental principle of securities law that the gain from an inside trade must be determined with reference to the date that information became public. Indeed, Congress has so instructed, providing the following rule for civil insider trading penalties:

> For purposes of this section, "profit gained" or "loss avoided" is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the non-public information.

15 U.S.C. § 78u-1(f). In enacting section 78u-1(f), Congress merely codified the guiding principle that had emerged from the case law, which considered how to measure gain in an insider trading case. The leading case is *SEC v. MacDonald*, 699 F.2d 47, 53-55 (1st Cir. 1983), which holds that where fraudulently obtained securities are publicly traded, the defrauded sellers can recover only those accretions occurring up to a reasonable time after they gained access to the material, nonpublic information at issue.

The rule articulated in both section 78u-1 and *MacDonald* follows logic and common sense. Further such a rule dovetails with the language and purpose of the sentencing guidelines.

The language "gain resulting from the offense" in the guidelines contemplates a causal connection between the bad act and the defendant's gain.

As suggested by the above-referenced authorities, it cannot be said that gain accruing to the defendant after information becomes public is "caused" by the defendant's bad act, i.e., trades based upon material, nonpublic information.

Further, the purpose of the relevant guidelines provisions is to determine victims' loss. U.S.S.G. § 2B1.1, note 2(B). In a case such as this one, the only possible victims are those shareholders who sold call options to Mr. Mooney without the inside information. After the information became public, these victims were able to replace these securities, and realize gain or loss on a level playing field. *See, e.g., MacDonald*, 699 F.2d at 53; *see also SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (approving district court's method of subtracting the sale price from the purchase price on the day after the inside information was released to the public to determine how much loss the insider avoided); and *Nye v. Blyth Eastman Dillon & Company*, 588 F.2d 1189, 1198 (8th Cir. 1978) (holding that the relevant date in a civil 10b-5 case is the date the defrauded investors no longer relied on the misrepresentations).

Accordingly, Mr. Mooney's "gain resulting from the offense" must be calculated using a reasonable period from the date of the public announcement to when the market fully absorbed the news.

As of June 28, 1995, United had already announced that the deal would be done (two days earlier), as opposed to the June 21 confirmation of mere talks between the two companies. The trading volumes provide strong evidence of when the news was fully absorbed into the market. *MacDonald*, *supra*, 699 F.2d at 55. The total volume of shares traded is higher for the period June 26, 27 and 28 (11.5 million) than the period June 21, 22 and 23 (8.3 million) suggesting that by June 22 the market was a long way from absorbing the news. June 28 was the day when the market had a reasonable period of time to absorb news of the deal. The District Court erred in using the dates of Mr. Mooney's sales in July and October 1995, long after the market had adjusted to news of the merger.

Mr. Mooney bought and sold call options. He did not buy options, exercise them to get shares of common stock, and then sell shares of common stock. Hence, the only possible victims of the crime were United shareholders who felt it was wise to write call options set to expire in late 1995/early 1996 at $35 per share. That is, the only possible victims were United shareholders who were betting that, by late 1995/early 1996, the price of United stock would not rise so high as to significantly outstrip the short-term gain they could obtain from selling the options. The option prices affirm this point. When Mr. Mooney purchased his call options, these option sellers were willing to make this bet as follows:

May 24-26:	Jan 35 options @ $5.625 per share
June 6:	Sep 35 options @ $6.25 per share
June 14:	Dec 35 options @ $8.125 per share

(Gov't Ex. 64; Def. Ex. 100, Def. Sent. Ex. A, Addendum.) Around the time news of the United-Metra merger first became public, shareholders making the same bet briefly asked for more money to part with call options; but when the dust settled on June 28 two days after confirmation of the merger, these shareholders were willing to make the same bet at only a slightly increased price from when Mr. Mooney purchased them. Michael Savino, an employee of the brokerage house which sold to Mr. Mooney, provided the prosecutor with the following options price history:

	June 20	June 21	June 22	June 28
Jan 35 call	7 3/4	9 3/8	11 1/4	8 1/8
Dec 35 call	7 3/4	8 7/8	11 1/4	8
Sep 35 call	6 3/8	8	10 1/8	6 5/8

(Def.'s Position Sent. Factors, Docket No. 82, Ex. A, Addendum.)

These statistics demonstrate two important points. First, as of June 28, the market had fully absorbed news of the merger and the prices demanded by writers of call options had retreated to close to their levels of June 20, and even of May 24-June 19. Second, when these shareholders were confronted with the same information that Mr. Mooney had prior to the merger, they viewed the likelihood of a significantly higher price of United stock in late 1995/early 1996 to be about the same as when Mr. Mooney purchased his call options.

On June 28, buyers and sellers of United call options were on the same footing with Mr. Mooney. To the extent that Mr. Mooney's call options increased in value after this date, such increase was due to ordinary market forces and not to an information disparity among the market participants. Thus, for the purposes of calculating gain, the value of Mr. Mooney's call options is as follows:

	June 28 price	x	no. of calls	=	June 28 value of calls
Jan 35	8 1/8		200		$162,500[8]
Dec 35	8		100		$80,000
Sep 35	6 5/8		100		$66,250
			Total:		**$309,750**

(*Id.*, Docket No. 82, Ex. A.) And therefore the "gain resulting from the offense" must be calculated as follows:

$309,750 (Value of calls on June 28)
$258,282.53 (Purchase price of calls)
$ 50,467.47 (Gross "gain resulting from the offense")[9]

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[8] As noted above and in the Presentence Report, one call option entitles to the holder the right to purchase 100 shares of stock at a certain price and by a certain time. Therefore, the purchase price of the call options is multiplied by 100, representing all the shares controlled by the purchaser. This is why the totals in this column are multiplied by 100.

[9] The Government appears to favor June 22, 1995 as an appropriate date. Even if that date were used, however, the "gain resulting from the offense" would still be significantly reduced. At trial, the Government contended that the Mooney's gain was about $180,000. The government stated as follows:

The second issue of first impression is whether the $142,000 loss from the sale of 20,000 shares of stock by Mr. Mooney in May 1995 must be subtracted from the gross gain as follows:

Gross Gain	$ 50,467.47
Loss on Sale of 20,000 shares	(142,000.00)
Net "gain resulting from the offense"	$(91,532.53)

The $142,000 loss occurred when Mr. Mooney sold 20,000 shares of his common stock on May 24, 2002, which sale is charged in Count I of the Indictment as part of the fraud. (Indictment ¶ 7, Docket No. 35.) Here we must return to the language of the guideline. "Gain resulting from the offense" in § 2B1.4 and § 2B.1.1, Application Note 2(D) is defined in the background comment to § 2B1.4 as the "total increase in value realized through trading in securities."

> As of June 22, 1995, following the publication of the merger negotiation between United and Metra Health, the value of Defendant Mooney's call options had increased to approximately $441,250. The gain to Mooney at that point was approximately $180,342.81.

(Gov't Trial Br., Docket No. 56, at 7.) The Government also told the jury in its opening statement, that the gain to Mooney was $180,000. (T. I-13.)

The evidence was that on April 13, 1995 Mr. Mooney took advantage of employee stock options to purchase 20,000 shares of United stock.[10] This was not alleged to be part of the fraud. When Mr. Mooney acquired them and placed them in his Recom account, the shares had a value of $917,500.00 (20,000 x $45.875 per share). He then sold them on May 17, 1995 in response to a margin problem at $38.875 per share, for a total of $777,500, incurring a loss of $142,000. Gov't Ex. 41; Def. Exs. 52 and 103. This sale was alleged to be part of the fraud. The indictment's charge was that Mr. Mooney sold these shares of common stock to illegally acquire the call options. Indictment ¶7, Dkt. 35. This specific sale is charged as Count I of the indictment. Id. ¶11.

It is beyond quarrel that in August of 1995 before the scheme began Mr. Mooney had these 20,000 shares of United securities. When sold on May 17, 1995, the shares were worth $142,000 less. Thus as a result of the transaction charged in Count I, there was no "increase in value realized." In fact, there was a loss. If this transaction is viewed not alone but as part of all of the trades charged in the indictment, the result is the same: the gain is $142,000 less.

The Government should not be permitted to claim that Mr. Mooney made a profit on his trades, yet ignore the loss that he suffered in the process.

[10] These employee stock options are different than the call options charged in the indictment.

Accordingly, the $142,000 must be subtracted from the amount of gain, resulting in no gain from the offense, and requiring a significant sentencing adjustment.

Had the District Court properly interpreted the term "gain resulting from the offense," Mr. Mooney would have been subject to a sentencing range significantly more favorable to him.[11] If this Court upholds Mr. Mooney's conviction, the Court should remand the matter to the District Court, requiring the District Court to calculate Mr. Mooney's "gain resulting from the offense" from a reasonable time after news of the United-Metra merger became public. Because this Court is in as good a position to determine this reasonable period as the District Court, Mr. Mooney requests that the Court direct the District Court to use the value of United call options on June 28, 1995 for the purposes of determining Mr. Mooney's "gain resulting from the offense," and to subtract the $142,000 loss from the gross gain.

[11] Based upon the calculations set forth above, under U.S.S.G. § 2B1.1(b)(1), Mooney's sentencing level would have been increased by 6 if the "gain resulting from the offense" is calculated as $50,467, and the increase would be zero if there was no gain. Under the current guidelines, assuming a two point increase for abuse of position of trust, the highest adjusted offense levels would be as follows: Mail Fraud Counts, U.S.S.G. § 2B1.1(a) – 8 or 14; Securities Fraud Counts, U.S.S.G. § 2B1.4 – 10 or 16; Money Laundering Counts, U.S.S.G. § 2S1.1 – 11 or 17. This would put Mr. Mooney's sentencing range at 8-14 months for no gain, or 24-30 months for $50,467 gain, both of which are far less than the sentence of 42 months that the District Court imposed.

II. The District Court erred in declining to grant Mr. Mooney's Motion for a Judgment of Acquittal because the Government failed to prove crucial elements of the alleged crimes.

Mr. Mooney moved for a judgment of acquittal at the conclusion of the government's case under Fed. R. Crim P. 29(a) and again within seven days after the guilty verdict under Fed. R. Crim P. 29(c). Both motions were denied. (T. V-44-86; Docket No. 69; ST.-11). Given the content of the Indictment and the evidence presented at trial, the District Court should have entered a judgment of acquittal on all counts. The evidence did not support the conclusion that any fraud was committed.

When considering a challenge to the sufficiency of the evidence to support a guilty verdict, the Court must view the evidence in the light most favorable to the verdict, and accept as established all reasonable inferences supporting the verdict. *United States v. Maggard*, 156 F.3d 843, 846 (8th Cir. 1998).

In ruling on a motion for judgment of acquittal, the role of the District Court is not to weigh evidence or consider the credibility of the witnesses, but rather to determine whether the government has presented evidence on each element sufficient to support a jury verdict. *Burks v. United States*, 437 U.S. 1, 16-17, 98 S.Ct. 2141, 2150 (1978); *United States v. Chavez*, 230 F.3d 1089, 1091 (8th Cir. 2000). However, "[w]here the government's evidence is equally strong to infer innocence as to infer guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal." *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971). A judgment of acquittal must be entered when "a reasonable fact finder must have entertained a reasonable doubt about the government's proof of one of the offense's essential elements." *United States v. Teitloff*, 55 F.3d 391, 393 (8th Cir. 1995).

A. Failure to prove the scheme to defraud.

In order to sustain a charge of mail fraud, 18 U.S.C. § 1341, the Government must prove beyond a reasonable doubt: the existence of a scheme to defraud and the use of the mails for purposes of executing the scheme. *United States v. Manzer*, 69 F.3d 222, 226 (8th Cir. 1995). In order to prove Securities Fraud under the "classical" insider trading theory, 15 U.S.C. §§ 78j(b), 78ff(a); 17 C.F.R. § 240.10b-5, the Government must prove beyond a reasonable doubt that "a corporate insider trade[d] on the basis of material, non-public information." *United States v. O'Hagan*, 521 U.S. 642, 652-53, 117 S. Ct. 2199, 2207 (1997). If the proof at trial fails to show a scheme to defraud as that term is used in the federal fraud statutes, insufficient evidence exists to uphold a conviction. *United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976).

Here, in the indictment, the Government alleged a coterminous theory of fraud for both the securities fraud and mail fraud counts. In fact, all of the mail fraud allegations were incorporated by reference into the securities fraud allegations in the indictment. Indictment ¶12, Docket No. 35. The Government alleged that Mr. Mooney used the mails to carry out a scheme to trade on the basis of material, inside information, in violation of the securities laws. (Indictment ¶¶ 2-4, Docket No. 35.) The alleged scheme or artifice to defraud was that Mr. Mooney acquired material, non-public information about the potential United-Metra merger, specifically that the merger would increase United's earnings per share, and would present new growth opportunities for United, and that the price of United's common stock was projected to increase as a result of the merger. (*Id.* ¶¶ 5-9.) The indictment proved to have a foundation of sand. There was no evidence that the merger would increase the earnings per share. There was no evidence that the price of United's stock was projected to increase short term as a result of the merger. The evidence presented at trial was to the contrary.

As discussed in more detail in the <u>Statement of Facts</u> *supra* at pp. 18-22, there was simply no evidence that the intended acquisition would increase United's earnings per share upon closing of the deal and bring new growth opportunities. Even the government witnesses conceded that there was no way to predict whether the price of United stock would increase in the short term. None of them – not Penshorn, not Conto, not Smith, not Springer, not Koppe – said it was a certainty that earnings (and therefore share price) would increase. (T. II-56 to 59; 75 to 76; Gov't Ex. 33, 34; T. III-57 to 59; T. III-78 to 81; T. III-109 to 110, 113, 120, 121.) The unrebutted expert witness testimony was that such a merger would typically make the price of United stock fall in the short term. (T. V-50 to 70.)

In the typical insider trading case, the offender knows to a greater certainty what the stock price will do when the news becomes public. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 117 S.Ct. 2199 (1997) in which the defendant knew that when the hostile tender offer was announced the price of Pillsbury stock would go from the market price of $39 to the tendered price of nearly $60. Unlike *O'Hagan*, Mr. Mooney had no way of knowing whether there would be a deal, nor of what the price of the deal was, nor what the price of the stock would be.

Professor Adams provided unrebutted testimony that Mr. Mooney's actions did not follow the pattern of a typical inside trader and, in fact, were inconsistent with the actions of an inside trader. As noted above, the reasons for his opinion included: (1) Mr. Mooney traded the call options in his own name (T. V-64); (2) One would typically expect the price of United stock to drop in the post-acquisition short-term, and therefore it makes no sense to stockpile call options in the acquiring company (T. V-59); (3) Mr. Mooney purchased more expensive call options that were set to expire far into the future, whereas an inside trader would purchase less-expensive call options set to expire near in the future (T. V-59 to –60); (4) Mr. Mooney sold his call options between three weeks and three months after news of the acquisition became public, whereas an inside trader would typically sell call options right after news of the merger became public (T. V-62 to –63); (5) In past United acquisitions, the price of United stock actually tended to drop in the short term after the acquisition (T. V-70); and (6) If Mr. Mooney had been trading using material information, he could have made much more money doing it by exercising additional employee stock options. (T. V-72.)

Both Professor Adams and the Recom witnesses confirmed that there existed an innocent explanation for Mr. Mooney's trades. At the time of the United-Metra merger talks and just after the preceding blackout period, Mr. Mooney needed to put additional equity into his Recom margin account to avoid a margin call. Professor Adams observed that, if an investor likes a stock, it is a common and lawful strategy to sell off common stock to cover the debt and purchase less-costly call options to maintain position in the stock. (T. V-66.) Further, the evidence showed a seasonal trend in the price of United stock, such that the price of the stock tended to fall in the spring and rise in a later part of the year. (T. V-65, Def.

Exs. 116-19, 125.) Adams testified that if an investor observed this pattern, he or she might rationally make the trades that Mr. Mooney made on that basis alone. (T. V-67to –69.)

A review of the government's closing argument shows the dearth of evidence proving a scheme to defraud. The only evidence it referred to as proof of a predicted earnings or share price increase was the Goldman Sachs analyses. The government contended that " . . . under every scenario, this was going to increase earnings per share to the shareholders." (T. VIII-11.) This was a gross exaggeration of the evidence, if not an outright canard. Smith's evidence showed that under numerous scenarios there would not be an increase in earnings. (T. II-103 to 106; Gov't Ex. 25, p. 4737.)[12] Smith referred to his data as "pretend." (T. II-104, 106.)

In sum, the scheme alleged in the Indictment is that Mr. Mooney sold the stock and purchased call options counting upon an increase in the price of United stock in 1995. In fact, the evidence showed that it would be impossible to predict

[12] There are other mis-statements in the prosecutor's closing. The prosecution told the jury that all Mr. Mooney had to do to cure his margin problem was to exercise employee stock options to restore equity to his Recom account. (T. III-59.) This was not true. Mr. Mooney was unable to exercise employee options without paying the purchase price and the tax in advance, which was in each case very expensive and would not yield the equity the prosecution claimed. *See* Defense Exhibits 52, 53 and 54. The prosecution also claimed the defense arguments were red herrings and not "the truth." (T. VIII-51, 57.)

an increase in the share price as a result of the merger. The evidence suggests that an innocent explanation for Mr. Mooney's trades is as strong. This state of affairs indicates that a rational jury must entertain reasonable doubt. Thus, the Government's case fails and this Court should reverse Mr. Mooney's Mail Fraud and Securities Fraud convictions.

B. Failure to prove relationship with mails.

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95, 65 S. Ct. 148, 151 (1944). The mailing must be sufficiently related to the alleged scheme such that the mailing's purpose is to execute the scheme. *United States v. Maze*, 414 U.S. 395, 400, 94 S. Ct. 645, 648 (1974). To determine whether this requirement has been met, the "relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time." *Schmuck v. United States*, 489 U.S. 705, 710, 109 S. Ct. 1443, 1447 (1989).

Use of the mails after a scheme to defraud has been completed is not a use for the purpose of executing the scheme and thus does not fall within the purview of the mail fraud statute. *Bliss v. United States*, 354 F.2d 456, 457 (8th Cir. 1966).

If the accused's scheme reached fruition prior to the mailings, as in *Maze*, the mailings are not sufficiently related to the scheme to bring the conduct within the purview of the statute. *United States v. Cooper*, 596 F.2d 327, 329 (8th Cir. 1979).

Here, as alleged in the Indictment, the Government's only link between the mails and the alleged scheme is the confirmation slips that Recom sent to Mr. Mooney after Mr. Mooney purchased the call options at issue. (Indictment, Docket No. 35, ¶¶ 4, 11.) The evidence adduced at trial demonstrates that these mailings played no part in the execution of the alleged fraud, and certainly were not conceived by Mr. Mooney to be part of the scheme at the time. Rather, the alleged scheme was complete by the time the mailings were sent.

The Government's own witness, the president of Recom, testified as follows:

> Q: So by the time the customer receives the confirmation, the customer already knows the trade has been done, typically.
> A: Yes. If you look at Exhibit 44, on the order ticket, there appears to be in the – a little box –
> Q: You're talking about this handwritten order ticket?
> A: Yes.
> Q: All right. Let's put that in front of the jury.
> A: In the little square in the right hand, at about the middle it has the handwritten "Mooney," it looks like, and a telephone number. Generally what this means – since I didn't take the order, it generally means that the customer wants a call and that's where he'll be, wanted a confirmation of that order. So that's how we indicate the customer wants to be called.

Q: So in this case, Mr. Mooney knew before the confirmation slip was ever mailed that the trade had been settled.
A: I assume that was followed through. I mean, it indicates that it was requested. I can't tell you that it actually happened.

(T. IV-26.) Later, a Recom employee who handled Mr. Mooney's trades testified as follows:

> Q: Does the confirmation slip tell [Mr. Mooney], then, anything about the trade that he doesn't already know? Remember the confirmation slip –
> A: Yeah.
> Q: -- I showed you a few minutes ago?
> A: Does it show, doesn't, no, no, he would know all his trades because I'd confirm it before the written confirmation goes out.

(T. VI-17.) This same employee also testified that, by the time the confirmation slip is mailed, the transaction is complete and all parties are committed to the transaction. (T. VI-13.)

In this regard, this case is distinguishable from *United States v. O'Hagan*, 139 F.3d 641, 652 (8th Cir. 1998), where this Court determined that the defendant used confirmation slips to further his insider trading scheme. In *O'Hagan*, this Court observed that the defendant had made a large number and varied types of fraudulent transactions, and therefore:

> This record-keeping function aided O'Hagan in his scheme to defraud. The jury could reasonably conclude that the confirmation slips helped O'Hagan keep track of his numerous Pillsbury option contract purchases made at various prices, in different quantities, with different strike prices, different expiration dates, and from different brokers,

> particularly given O'Hagan's testimony before the SEC that he called one of his brokers after he received a confirmation slip to inquire about that option's expiration date.

Id. Here, Mr. Mooney is accused of a mere handful of fraudulent securities trades, all with the same broker and all preceded by Mr. Mooney's complete knowledge of the terms of the transaction. Unlike *O'Hagan*, there is absolutely no evidence suggesting that Mr. Mooney used the confirmation slips in furtherance of any scheme. Hence, the evidence submitted concerning the mail fraud counts is insufficient and his conviction on these counts should be reversed.

C. Failure to prove elements of money laundering.

In order to sustain a charge of money laundering under 18 U.S.C. § 1957, the Government must prove the following elements beyond a reasonable doubt: (1) that the defendant engaged or attempted to engage, (2) in a monetary transaction, (3) in criminally derived property that is of a value greater than $10,000, (4) knowing that the property is derived from unlawful activity, and (5) that the property is, in fact derived from specified unlawful activity. *United States v. Caruso*, 948 F. Supp. 382, 390 (D.N.J. 1996) (citing *United States v. Sokolow*, 91 F.3d 396, 408 (3d Cir. 1996) and *United States v. Johnson*, 971 F.2d 562, 567 n.3 (10th Cir. 1992)).

Because the statute requires a showing of property derived from a predicate unlawful activity, the money laundering counts must fail if the mail fraud and securities fraud counts fail. *See id.* Since, as discussed above, these predicate offenses fail for sufficiency of evidence, so must the money laundering counts.

The money laundering counts fail for insufficient evidence for another independent reason. A Government witness—the FBI agent who investigated Mr. Mooney's allegedly fraudulent transactions—testified that, after the sale of Mr. Mooney's call options at issue, Mr. Mooney made withdrawals from his Recom margin account which were subsequently placed in his personal bank account. (T. V-12 to -21, Gov't Ex. 72, Addendum.) These are the transactions that the Government charged in the Indictment under Section 1957. (Indictment, Docket No. 35, Counts 13-17.) However, this same FBI agent testified that Mr. Mooney had enough equity in his Recom account—equity having nothing to do with the call options at issue—to fund the checks deposited into his personal bank account. (T. V-39 to 41; Gov't Ex. 41, 72 and 73, Addendum.) Independent of the FBI Agent's testimony, the Recom records alone show that Mr. Mooney had clean funds in the account of $454,617.29 as of April 28, 1995, before the date alleged in the indictment. (Gov't Ex. 41 and 73; T. IV-35 to 36.)

The courts have held that, in such a situation, there exists insufficient evidence of a Section 1957 Money Laundering violation. Recently, in construing this statute, the Court of Appeals for the Fifth Circuit held as follows:

> [M]oney is fungible. The commingling of assets has placed courts in the difficult position of separating "clean" from "dirty" funds. Although any accounting method employed to this end inevitably exhibits certain "arbitrary" characteristics, a rule of decision is necessary. In *United States v. Davis*, we stated the following rule for section 1957 cases involving commingled accounts: "[W]hen the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account." *Davis* also implies the converse—<u>that where an account contains clean funds sufficient to cover a withdrawal, the Government cannot prove beyond a reasonable doubt that the withdrawal contained dirty money.</u>

United States v. Loe, 248 F.3d 449, 466-67 (5th Cir. 2001) (emphasis added and footnotes omitted); *accord United States v. Rutgard*, 116 F.3d 1270, 1292-93 (9th Cir. 1997) (same holding).

Here, as in *Loe*, "clean" monies were commingled with allegedly "dirty" monies in Mr. Mooney's Recom account. (T. V-39 to 41; Gov't Ex. 41, 72 and 73.) The Government only charged Mr. Mooney with money laundering based upon withdrawals from the account. (Indictment, Docket No. 35, Counts 13-17.) As in *Loe* and *Rutgard*, because the evidence is that there existed enough clean funds in Mr. Mooney's Recom account to cover the checks at issue, the

Government did not prove beyond a reasonable doubt that the checks were drawn on "dirty" funds, and therefore these counts fail for insufficiency of evidence.

Further, since there exists insufficient evidence to sustain the predicate money laundering offense under the forfeiture statute alleged in the Indictment, 18 U.S.C. § 982(a)(1), the jury's award of forfeiture must also be reversed. *See, e.g.*, *Rutgard*, 116 F.3d at 1293 (government's position at trial tied forfeiture allegations to 18 U.S.C. § 1957 money laundering allegations and, therefore, failure of the money laundering counts for insufficient evidence results in failure of the forfeiture allegations).

Finally, Mr. Mooney's sentence will of necessity be less if the money laundering convictions are reversed; the case must be remanded for resentencing.

III. The District Court erred in ruling that the prosecution could impeach Mr. Mooney with a 15 year old gross misdemeanor conviction, depriving him of his right Fifth and Sixth Amendment right to testify in his own defense.

The right to testify in one's own defense is a fundamental right protected by the Fifth and Sixth Amendments to United States Constitution. *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S. Ct. 2704, 2707-10 (1987). A waiver of such a right must be voluntary, knowing, and intelligent. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981). A waiver cannot meet this standard if it is based on misinformation of a crucial nature provided by the court or if it is wrenched from a reluctant defendant by threatening him with drastic consequences that the state may not lawfully impose. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468 (1970).

Here, the District Court violated Mr. Mooney's constitutional rights, causing him to involuntarily waive his right to testify on his own behalf, by issuing an *in limine* ruling that a 15-year-old tax conviction could be used to impeach his credibility under Fed. R. Evid. 609 if Mr. Mooney were to testify. (T. VI-2 to -8.) This Court is no doubt aware of the Supreme Court's ruling in *Luce v. United States*, 469 U.S. 38, 105 S. Ct. 460 (1984), holding that a defendant must actually testify in order to preserve for review an *in limine* ruling under Fed. R. Evid. 609. The undersigned understands *Luce* to construct a federal rule of procedure for evidentiary rulings "not reaching constitutional dimensions." 469 U.S. at 43, 105 S. Ct. at 464. As argued here, the District Court's evidentiary error did, in fact, reach constitutional dimensions and should be reviewed by this Court. This case is different on its facts. In *Luce* there was no indication the court would permit the impeachment if the defendant took the stand. Here the court ruled that if Mr. Mooney testified, he could be impeached. (T. VI-8.)

At issue was Mr. Mooney's 1986 guilty plea for failure to file Minnesota state tax returns during the mid-1980s. (*Id.*, Def.'s Mem. in Opposition to

Impeachment.) The defense sought an *in limine* ruling that this conviction could not be used to impeach Mr. Mooney's credibility under Fed. R. Evid. 609 if Mr. Mooney were to testify. (Docket No. 53, 59; T. VI-3; Court Exhibit 1.) The rule provides, in relevant part, as follows:

> For the purpose of attacking the credibility of a witness * * * evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.
>
> * * *
>
> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, which is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Fed. R. Evid. 609(a), (b).

The District Court acknowledged that the rule in the Eighth Circuit is that civil tax problems do not indicate lack of truthfulness for the purposes of Rule 609(a). *United States v. Escobar*, 50 F.3d 1414, 1424 (8th Cir. 1995). Nevertheless, the District Court relied on foreign authority suggesting that, in the appropriate case, failure to file tax returns may be deemed probative of truthfulness under Rule 609. (T. VI-7.) In doing so, the District Court ignored contrary authority indicating that such offenses cannot be said to necessarily involve dishonesty. *Cree v. Hatcher*, 969 F.2d 34, 37-38 (3d Cir. 1992).

Moreover, the District Court ignored the rule that where a party attempts to impeach a witness with a prior conviction, "if it occurred long before and has been followed by a legally blameless life, [the conviction] should generally be excluded on the ground of remoteness." *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). This Court has disallowed evidence of prior convictions for impeachment purposes where the convictions were greater than ten years old, particularly where the convictions are not especially probative of truthfulness. *United States v. Dennis*, 625 F.2d 782, 798-99 (8th Cir. 1980); *see also United States v. Thorne*, 547 F.2d 56, 58 (8th Cir. 1976) (noting that "[c]learly, under Rule 609(b) the [24-year-old and 18-year-old] convictions were inadmissible.").

Moreover, the District Court failed to meet the requirement of showing specific facts and circumstances demonstrating that use of a 15-year-old conviction would substantially outweigh its prejudicial effect. The District Court reasoned that the circumstances were as follows:

> [Mr. Mooney's] failure to comply with the same rules, particularly under the spectre of ongoing and regular tax reviews of people who previously have been convicted of tax crimes, makes it probative of the questions at issue, and the Court determines it appropriate to enter it into evidence should the defendant take the stand.

(T. VI-8.) Rather than providing specific circumstances justifying use of the conviction to impeach, the District Court appears to directly contradict the Federal Rules of Evidence by suggesting that the Mr. Mooney's prior conviction could be used to prove conduct in conformity therewith. Further, the District Court's reasoning—that Mr. Mooney's prior tax conviction would make him more wary of regulators—actually argues against admissibility of the prior conviction. The District Court completely failed to provide specific circumstances suggesting how Mr. Mooney's failure to file state tax returns 15 years prior bears on an allegation that he committed fraud much later.

This conclusion is bolstered by the fact that Mr. Mooney proffered information that, for some of the years he failed to file his state tax returns, the state actually owed him money, and the net amount owed was approximately $274. Further, during the years in question, Mr. Mooney filed his federal income tax returns. (T. VI-5; Docket No. 59 and Court Exhibit 1.)

The error was not harmless. Mr. Mooney wanted to testify and would have testified but for the district court's erroneous ruling. (Docket No. 70.) He would have denied the charges and explained the reasons he traded when he did. He would have testified he had no material information because he did not know whether there would be an acquisition, nor did he know when, nor did he know what the stock price would be. He would have testified that he did not use the information he had about the acquisition, nor trade on the basis of it. He would have denied violating company policy against insider trading because he did not believe he had material information when he traded. He was not an officer of the company, and was therefore not required by policy to report his trades to the company. He would have denied lying to the company's counsel about whether he traded, and affirmed that he did nothing to conceal his trades, which he reported on his federal tax returns and paid the required tax. (Docket No. 70 and Addendum, Instruction 52).

In the final analysis, the District Court's evidentiary ruling was plainly erroneous and unduly burdened Mr. Mooney's constitutional right to testify on his own behalf. Mr. Mooney is therefore entitled to a new trial on this ground.

CONCLUSION

As set forth above, the District Court's evidentiary error infringed on Mr. Mooney's Constitutional rights to testify and prejudiced his right to a fair trial. Further, the Government failed to prove its case against Mr. Mooney in several respects. Finally, even assuming that the conviction is valid, the District Court erroneously construed the Sentencing Guidelines and imposed an illegal sentence upon Mr. Mooney. For these reasons, Mr. Mooney requests that this Court (1) reverse his convictions; or (2) reverse and remand for a new trial; or (3) reverse and remand for resentencing.

Respectfully submitted,

Dated: **FELHABER, LARSON, FENLON & VOGT, P.A.**

By: ________________________________

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CERTIFICATE OF COMPLIANCE

Jon M. Hopeman, attorney for Appellant, certifies that this brief complies with the type-volume limitation contained in Rule 32(a)(7) as follows:

There are 13,418 words and 1,228 lines in this brief. The word processing software used to prepare this brief was Microsoft Word.

Mr. Hopeman further certifies that the diskettes submitted to this Court and opposing counsel in accordance with Rule 26A(d) of the local rules of the Eight Circuit Court of Appeals have been scanned for viruses and are virus free.